LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 8 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 902

PAUL GINSBURG, Petitioner

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

PAUL GINSBURG,
Counsel for Petitioner

Carlton House
550 Grant Street
Pittsburgh 19, Pennsylvania

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX TO BRIEF

	PAGE
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	3
Statement of the Case	3
Reasons for Allowance of the Writ	11
I. The Judgment Sought to be Reviewed Conflicts With the Law of the Land	11
A. The Respondent Waived its Right to Claim Injunctive Relief Below, Assuming Arguendo It Had the Right	11
B. The Respondent Lacked a Right Because of Its Own Wrong	14
C. The Court Below Erred in Refusing to Be Bound By the Federal Rules of Civil Procedure	16
D. Petitioner Should Not Be Subjected to Government By Men	17
II. The Judgment Sought to Be Reviewed Has Deprived Petitioner Discriminatorily of His Right to Due Process of Law, Unlawfully Depriving Him of His Right to Summary Judgment	17
A. Petitioner Has Been Deprived of the Right to Full Use and Enjoyment of the Proceeds	18
B. Petitioner Has Been Deprived of His Right to a Day in Court	18
C. Petitioner Was Denied Equal Protection of the Federal Rules	18
D. Petitioner was Denied Judicial Consideration and Review of His Cause	19
Conclusion	20

INDEX TO APPENDIX

Opinion and Judgment	1

TABLE OF CITATIONS

CASES	PAGE
Acadian Production Corp. v. Land, 136 F.2d 1 (C.C.A. 5, 1943)	13
Black v. Shondell, 174 F.2d 567 (C.C.A. 8, 1949)	12
Coburn v. Coleman, 75 F. Supp. 107 (D.C. W.D. S.C., 1947)	13
Deitrick v. Greaney, 309 U.S. 190, reh. den., 309 U.S. 697 (1940)	16
Foltz v. Moore-McCormack Lines, Inc., 19 F.R.D. 301	16
Ginn v. Biddle, 60 F. Supp. 530 (E.D. Pa., 1945)	13
Phillips v. Baker, 121 F.2d 752 (C.C.A. 9, 1941)	13
Rank, et al. v. United States, et al., 16 F.R.D. 310 (U.S. D.C., S.D. Cal., N.D.)	12
SMS Mfg. Co. v. U.S.-Mengel Plywoods, Inc., 219 F.2d 606 (C.C.A. 10, 1955)	19
Stearns Co. v. United States, 291 U.S. 54 (1934)	16
Van Sant v. American Express Co., 169 F.2d 355 (C.C.A. 3, 1948)	12

RULES

Federal Rules of Civil Procedure

Rule 7(a)	11
Rule 7(b)	11
Rule 8	11
Rule 8(c)	5, 11, 12
Rule 12(a)	11
Rule 12(b)	11
Rule 12(h)	5, 11, 12, 13
Rule 56	2, 4, 7, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. .....

PAUL GINSBURG, Petitioner

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paul Ginsburg, petitioner, respectfully prays that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Second Circuit to review its judgment dated and entered January 28, 1959 (App. 1); and the Order denying Petition for Rehearing (R. 41a) dated and entered February 19, 1959.

OPINIONS BELOW

The Order of the United States District Court for the Southern District of New York, which was the subject of the appeal, was not accompanied by an Opinion. However, after the expiration of the time for filing Notice of Appeal, there was filed in the District Court a

"Memorandum of Bicks, D. J.", which is reported in 170 F. Supp. 212. The Opinion of the United States Court of Appeals for the Second Circuit is reported in 263 F. 2d 608, and is appended hereto (App. 1).

JURISDICTION

The judgment sought to be reviewed (App. 1) was dated and entered January 28, 1959.

The Order of the Court of Appeals denying the Petition for Rehearing (R. 41a) was dated and entered February 19, 1959. Therefore, the time for filing this petition for writ of certiorari expires May 20, 1959.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., Section 1254 (1); and the general supervisory power of this Court over lower Federal Courts.

QUESTIONS PRESENTED

1. When the defendant has already failed to plead or otherwise defend the action, and thus waived the right to do so, pursuant to the Federal Rules of Civil Procedure; does a District Court Judge have the right to grant the defendant an affirmative defense *nunc pro tunc* applied for in a way not provided for by the Rules? And is not the sanctioning by the Court of Appeals of such a departure from the accepted and usual course of judicial proceedings, grounds for a writ of certiorari?

2. When there is no genuine issue as to any material fact, the defendant already being in default of pleading or otherwise defending the Complaint and having waived the right to do so pursuant to the Federal Rules of Civil Procedure, must not summary judgment be entered for the plaintiff as a matter of law under Rule 56?

CONSTITUTIONAL PROVISION INVOLVED

The provision of the Constitution of the United States involved herein is the Fifth Amendment, the pertinent portion of which (U.S.C.A., Constitution, Amendments 1 to 13, p. 172) is as follows:

"Amendment V. Due Process of Law . . . nor (shall any person) be deprived of life, liberty, or property, without due process of law: . . ."

STATEMENT OF THE CASE

The petitioner, Paul Ginsburg, is a practicing lawyer of Pittsburgh, Pennsylvania; a member in good standing of the Bar of State and Federal Courts in Pennsylvania and of this Honorable Court; and a member in good standing of The Allegheny County Bar Association (and past officer thereof), the Pennsylvania State and American Bar Associations.

The respondent, The Mutual Life Insurance Company of New York, is a New York corporation engaged, *inter alia,* in the business of selling policies of life insurance.

Petitioner's complaint (R. 4a-6a) with jurisdiction based upon diversity of citizenship and a sum in excess of $27,000.00 exclusive of interest and costs was brought on May 11, 1953, to secure the proceeds of policies of insurance issued by the respondent on the life of plaintiff's brother, Samuel A. Ginsburg, who died on April 7, 1953, of which policies the plaintiff is the sole beneficiary and absolute owner. The respondent as the defendant in the District Court failed to appear and plead or otherwise defend this action pursuant to the Federal

Rules of Civil Procedure. After the expiration of the time within which defendant could plead or otherwise defend the action, it mailed to the Clerk of the district court for filing on July 1, 1953, and on September 21, 1953, affidavits of Arthur Kaiser exhibiting unauthenticated restraining orders supposedly entered in the District Court for the Western District of Pennsylvania in Civil Action No. 11521 which purported to enjoin plaintiff from prosecuting this action. On December 4, 1957, with full knowledge of the entire file, as aforesaid, District Judge Alexander Bicks entered an Order to File Note of Issue in 120 Days (R. 7a) under penalty of dismissal for want of prosecution. Pursuant to said Order which was filed on December 6, 1957, the defendant was served with plaintiff's Note of Issue (R. 8a) and Statement Pursuant to Calendar Rule 5, which the defendant did not oppose. Accordingly, the case was assigned No. 105 on Jury Calendar 2.

In that state of the record the plaintiff moved the Court to enter summary judgment against the defendant in the sum of $27,456.38, the principal amount sued for, together with interest thereon from April 7, 1953, at the rate of 6% and the costs and disbursements of this proceeding (R. 9a) pursuant to Rule 56. After the plaintiff's Motion for Summary Judgment was filed May 6, 1958, returnable May 15, 1958, the defendant through Attorney Haughton Bell served a Notice of Special Appearance and a Cross-Motion for Order Directing That Injunction of Another United States District Court Be Made the Order of This Court and That this Action Should Not Be Placed on Any Trial or Assignment Calendar (R. 10a-11a), although there is no provision for a special appearance or such a cross-motion under

the Rules. Apparently the defendant belatedly was trying to assert an affirmative defense which is waived pursuant to Rule 12(h) unless pleaded pursuant to Rule 8(c).

In the District Court, petitioner's affidavit in support of Motion for Summary Judgment shows that the alleged restraining order entered in the Pennsylvania District has long since its entry become ineffective and unenforceable; that the alleged order was entered in an interpleader proceeding which was fraudulently instituted by reason of misrepresentations that there was another adverse claim against the defendant; that the other "claim" was adverse to the plaintiff only as it claimed that the proceeds of the policies should be *paid to plaintiff* as trustee instead of individually; that the said interpleader action, together with the interpleaded fund, was illegally transferred on May 29, 1957, from the Pennsylvania District to the Arizona District where it is still pending and undetermined; that on February 13, 1958, at the instance of The Mutual Life Insurance Company of New York an Order was entered in the Pennsylvania District, upheld by the Court of Appeals for the Third Circuit at No. 12551 on February 20, 1958, that the Pennsylvania District is without jurisdiction and any relief must be pursued in the Arizona District. Therefore, it was plaintiff's position below that it had become inconsistent, improper and unlawful for the defendant herein to maintain that said ineffective and unenforceable restraining order should continue to hinder, and frustrate the instant action unduly. Furthermore, the defendant did not seek injunctive relief in the Arizona District after transfer of the cause; nor has it sought such relief in the New York District pursuant to

the Federal Rules of Civil Procedure, and is foreclosed from doing so. Accordingly, it was plaintiff's final proposition that assuming *arguendo* the alleged restraining order to be valid and subsisting in the Pennsylvania District and the Arizona District, nevertheless it cannot be recognized, considered and effectuated in the New York District because defendant has done nothing to entitle it thereto under the Rules, which the Court is powerless to waive. As a matter of fact and of law, the lower court was powerless even to take Judicial Notice of the alleged unauthenticated restraining order.

In the face of the record and the fully supported motion for summary judgment, and inconsistently with its failure to oppose plaintiff's Note of Issue, the defendant served its "special appearance" and "cross-motion" (10a-11a). Unrealistically, the three averments of the cross-motion (10a) seek the impossible. Averment 1 admits that the alleged restraining order of the Pennsylvania District has not been made an order of the court below, and said court is not bound thereby; that the defendant is in default; that the plaintiff is entitled to summary judgment; and, in effect, that the defendant seeks the special privilege of not being bound by the Federal Rules of Civil Procedure and the applicable law. Averment 2 moves the Court to overlook the then existing listing of the case on the jury calendar as though the calendar were never published, by ordering the Clerk and Calendar Commissioner not to list it. Averment 3 is a typical prayer normally concluding a properly drawn equity action for an injunction, the main apparent defect being that it is not preceded by an apparent complaint. The affidavit attached thereto does not contain any factual or legal opposition to plaintiff's motion for summary

judgment, and could not possibly justify the insupportable and untenable cross-motion which it presumes to support. The said cross-motion constitutes a misrepresentation to the Court that the alleged unauthenticated restraining order of the Pennsylvania District is a valid and subsisting injuction which should be recognized, considered and effectuated in the New York District in violation of the Federal Rules of Civil Procedure and the applicable law.

On May 15, 1958, the action was before District Judge Alexander Bicks on plaintiff's Motion for Summary Judgment pursuant to Rule 56, and defendant's cross-motion in violation of the Rules, at which time Judge Bicks admitted plaintiff to the Court specially for this case and granted plaintiff ten minutes for his presentation and ten minutes for rebuttal. Without reason, the plaintiff's argument from the start was incessantly interrupted and then abruptly terminated by Judge Bicks who actually denied plaintiff the right to be heard. Then Judge Bicks assumed the representation of the defendant by making arguments in its behalf *sua sponte,* and voluntarily offering counsel for the defendant (1) the grant of transfer of the cause to Arizona if he would present such a motion, (2) a donation of counsel fees if he would present such a motion, and (3) other relief to which defendant was not entitled. The embarrassed counsel for defendant refused to accept Judge Bicks' offerings of fees and transfer, but readily accepted the other relief, as evidenced in Judge Bicks' Order (12a-14a) entered June 27, 1958, which is the subject of the appeal. The said Order is inconsistent and in direct conflict with Judge Bicks' prior Order to File Note of Issue.

By the Order of June 27, 1958, the district court erroneously held that (1) plaintiff's Motion for Summary Judgment be denied; (2) the affidavits exhibiting the alleged unauthenticated restraining orders "be regarded as constituting defendant's answer timely filed to the complaint herein setting forth as defendant's defense to said complaint the facts contained in said affidavits"; (3) plaintiff "be and hereby is permanently enjoined and prohibited from prosecuting this action, or any other action for or on account of the amounts payable under or in any way connected with insurance policies #6149400 and #6149401 issued by the defendant other than the action in the United States District Court for the Western District of Pennsylvania (Civil Action #115.21)"; and (4) this action be marked "enjoined" in the Court's files and records of this action.

Because the said affidavits filed July 1, 1953, and September 21, 1953, for defendant in the District Court are not pleadings under the Rules, and otherwise were not procedurally or properly before the Court, your petitioner did not print them for use of the Court below, but the respondent did (R. 17a-23a). Furthermore, because the "Memorandum of Bicks, D. J." was not filed until after expiration of the time for filing Notice of Appeal, your petitioner did not print it for use of the court below, but the respondent did (R. 24a-27a).

Just as District Judge Alexander Bicks violated the Canons of Judicial Ethics in his mistreatment of your petitioner, and violated the Federal Rules of Civil Procedure in his mishandling of the cause of action, your petitioner and his cause were to meet the same fate on appeal with Hon. Harold R. Medina presiding. Circuit Judge Medina delimited unduly the time for oral argu-

ment by his asseveration that he had read the briefs and by his menacing demeanor that appellant had better hurry and leave, "or else—". Originally petitioner had been notified that the argument in the Court of Appeals would normally be had by the middle of November, 1958, but later petitioner was notified that it was set definitely for January 15, 1959, when Circuit Judge Medina was presiding. After the brush-off in open Court, and the one sentence opinion (App. 1) both insupportable and unsupported, your petitioner investigated and found that the jurist's son, Harold R. Medina, Jr., Esquire, has a law partner on the Board of Trustees of respondent, The Mutual Life Insurance Company of New York, the said law partner being Roswell Magill, Esquire, of Cravath, Swaine & Moore; and further that there is a definite connection between the clientele of Harold R. Medina, Jr., Esquire, and members of the Board of Trustees of The Mutual Life Insurance Company of New York. It is respectfully submitted that Circuit Judge Medina should have recused himself.

The appeal might just as well have been argued before District Judge Bicks.

The judgment sought to be reviewed based th affirmance on the opinion of Judge Bicks which is not even properly of record, because it was entered and filed after the appeal. The denied Petition for Rehearing shows that the Court of Appeals overlooked or misapprehended the entire appeal (mistakenly reviewing "an order of the District Court refusing to vacate a prior order . . .") (App. 1) as well as every one of appellant's points, all fully supported under the Federal Rules of Civil Procedure and the applicable law. In the

Order denying rehearing (R. 41a) the Court of Appeals backtracked, but not enough to do justice, stating, "The basis of our affirmance is the existence of a valid outstanding injunction restraining the further prosecution of this case by appellant. None of the technical arguments advanced by appellant furnish any ground for the disregard by us of this injunction." By what the Court failed to state, it has admitted that said "valid outstanding injunction" is not enforceable or even cognizable in the New York District; and the "arguments advanced by appellant" are the Law of the Land but are erroneously disregarded because "technical". The "opinion" (App. 1) of the Court of "Appeals", consisting of one sentence, is violative of Canons of Judicial Ethics requiring a discussion of the points and authorities of the unsuccessful as well as the successful party in order to keep the decision above suspicion. The denial of rehearing was in due course followed by denial of a Motion to Remand on March 24, 1959, which motion was wholly meritorious and showed why this Honorable Court will grant certiorari. On page 4 of the Motion to Remand (R. 48a) petitioner expressed the futile hope "that the consideration of this motion will not be influenced by the fact that a law partner of Harold R. Medina, Jr., Esquire, is on the Board of Trustees of The Mutual Life Insurance Company of New York. Said law partner is Roswell Magill, Esquire, of Cravath, Swaine & Moore". Typical of the treatment received below is the denial on April 3, 1959, of the Motion for Stay of Mandate (R. 54a).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Judgment Sought To Be Reviewed Conflicts With the Law Of The Land.

A. *The Respondent Waived Its Right To Claim Injunctive Relief Below; Assuming Arguendo It Had The Right.*

When plaintiff's Motion for Summary Judgment had been served, the defendant was entirely in default of pleading or otherwise defending the action under the Federal Rules of Civil Procedure. Under Rule 7(a) defendant could have filed an Answer; and no other pleading shall be allowed. Rule 7(b) provides further (1) An application for an Order shall be by motion in writing, which shall state with particularity the grounds therefor and the relief or order sought; and (2) The rules applicable to captions, signing and other matters of form of pleadings apply to all motions and other papers provided for by these rules. Rule 8 provides the General Rules of Pleading, and all affirmative defenses such as the injunctive relief sought herein must be pleaded specially under Rule 8(c). Under Rule 12(a), a defendant shall serve his answer within 20 days after the service of the summons and complaint. Under Rule 12(b) every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that certain defenses may at the option of the pleader be made by motion. Under Rule 12(h) a party waives all defenses and objections which he does not present either by motion as hereinabove provided or, if he has made no motion, in his answer or reply. The defendant herein did not comply with any of the foregoing Rules, ignor-

ing all of the applicable Rules. Certainly by its failure to plead for injunctive relief under Rule 8(c), it has waived that affirmative defense pursuant to Rule 12(h). The case of *Van Sant v. American Express Co.*, 169 F. 2d 355 (C. C. A. 3, 1948), is authority for the point that defenses by way of confession and avoidance must be pleaded under Rule 8(c), otherwise they are waived pursuant to Rule 12(h), and then are not allowable subsequently by amendment. In the case of *Rank, et al. v. United States, et al.*, 16 F. R. D. 310 (U. S. D. C., S. D. Cal., N. D.), the defendant United States of America failed to file a pleading or motion other than a motion to dismiss which had been overruled. Instead it had filed various documents entitled "Suggestions" under Rule 12(h)(2), raising the Court's lack of jurisdiction. The Court held (p. 313) even against the United States that "Obviously a 'Suggestion' made under Rule 12(h) is not a pleading, nor is it a motion under the Federal Rules of Civil Procedure. And, filing a 'Suggestion' does not relieve a party from pleading or moving the Court under the Federal Rules of Civil Procedure." Thereupon, the Court ordered (pp. 313-314) that the "Suggestions" be denied, overruled, rejected, stricken. Analogously, herein, the same disposition should be made of the affidavits of Arthur Kaiser upon which defendant herein relied.

In support of this point are the following additional authorities. Defendant waived the defense that petition did not state a claim upon which relief could be granted by failing to present that defense either by answer or motion as required by Rule 12(h). *Black v. Shondell*, 174 F. 2d 567 (C. C. A. 8, 1949). Lack of capacity to sue must be questioned by a motion prior to answer,

or in the answer itself, otherwise the objection is waived. *Coburn v. Coleman*, 75 F. Supp. 107 (1947) (D.C., W. D. S .C.). Where the defense of lack of jurisdiction of the person is not raised by motion before answer or in the answer itself, the defense is waived by Rule 12(h), not because of the defendant's voluntary appearance, but because of his failure to assert the defense within the time prescribed by this rule. *Ginn v. Biddle*, 60 F. Supp. 530 (1945 E. D. Pa.). Where it was stipulated that essential elements conferring general jurisdiction on District Court were present, and defendant corporation entered no plea or objection of improper venue, any right defendant corporation might have had to be sued in another district was waived. *Acadian Production Corp. v. Land*, 136 F. 2d 1 (C. C. A. 5, 1943).

Subdivision (h) of Rule 12 intends that any defense permitted to be made by motion at option of defendant, and which is not raised either by motion or by answer, will be deemed to have been waived. *Phillips v. Baker*, 121 F. 2d 752 (C. C. A. 9, 1941), certiorari denied 314 U. S. 688. The authorities on this point are so numerous and uncontradictable that petitioner is justified in arguing that because nothing of record indicates that those herein representing The Mutual Life Insurance Company of New York are in need of protection by guardian because of mental or physical incompetence, minority or senility, or any other reason, District Judge Bicks was indiscreet to grant the defendant *nunc pro tunc* a non-existent (or even legal) defense not pleaded and therefore waived, to "protect" the defendant from its liabilities imposed by law.

B. *The Respondent Lacked A Right Because Of Its Own Wrong.*

The respondent's first wrong was perpetrated when it breached its contracts of insurance with petitioner, who was not only the sole beneficiary named therein but also the absolute owner thereof. After the decedent-insured's wife had unalterably decided to divorce him and after the decedent-insured had made a complete financial settlement accepted by his wife, then he transferred all rights in the policies to petitioner, his brother. The decedent-insured had the legal right to make the transfer for any reason or for no reason at all. Nevertheless, both before and after petitioner surrendered the policies for payment, respondent was dealing behind his back with decedent-insured's ex-wife and her divorce attorney, giving them confidential information relating to petitioner's contracts and encouraging them to bring suit framed on an oral trust created "at the time" of the transfer.

The respondent's next wrong was in interpleading the proceeds, because it was a patently fraudulent interpleader, and most damaging to petitioner. Like conspirators usually do, the respondent and its counsel and the ex-wife and her counsel made a mistake. Instead of deciding upon a different trustee for the "oral trust", they wanted to be "honest" about it and decided that your petitioner was the trustee and so alleged. As a result, all that respondent had to do to be relieved of all liability was to pay your petitioner individually and/or as trustee. But that would not stop a contract breaker like The Mutual Life Insurance Company of New York from interpleading under a statute that pro-

vides for it only when two or more adverse claims are made *against the insurer.*

A most reprehensible wrong on the part of respondent is its repeated attempts to exert undue influence to cause adverse decisions against your petitioner both in the Pennsylvania District and the Arizona District to which the cause was illegally transferred. It is elementary that *in rem* proceedings, such as an interpleader, are not subject to transfer under 28 U.S.C.A., sec. 1404(a), or otherwise. That is why District Judge Bicks, in assuming the representation of the defendant, could not find an interpleader action which stated the principle set forth in the Opinion he cited of Chief Judge L. Hand in the case *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 2 Cir., 1950, 178 F. 2d 866, holding that Orders of the Court are not vitiated by transfer. Even if Judge Bicks could have cited an interpleader action stating that same principle, it would not have supported his decision because on top of that insurmountable burden he would have had the impossible one of finding authority that defendant could obtain enforcement of such order in a foreign jurisdiction without complying with the Rules.

The other "authority" Judge Bicks located to "justify" his personal opinion was Rule 6(b)(2) authorizing enlargement of time to file, on motion, for excusable neglect. This Rule is not applicable herein, but even if it were, Judge Bicks overlooked or misapprehended the point in applying it that he would be enlarging the time for filing nullities.

In view of the above mentioned wrongs perpetrated by the respondent, it is barred from the relief donated

to it by Judge Bicks and sanctioned by Judge Medina on the principle that a party cannot be permitted to take advantage of its own wrong. *Stearns Co. v. United States*, 291 U. S. 54, 61-62 (1934); *Deitrick v. Greaney*, 309 U. S. 190, 196, rehearing den., 309 U. S. 697 (1940).

It is respectfully submitted that when the defendant's own wrong is at the bottom of its own default in an attempted defense of an action, it is reversible error for Judges to permit the defendant to take advantage of its own wrong, thus depriving the plaintiff of his right to the protection and enforcement of the Federal Rules of Civil Procedure.

C. *The Court below erred in refusing to be bound by the Federal Rules of Civil Procedure.*

This point is elementary and District Judge Bicks would not have to leave his Court for authority in support. District Judge Weinfeld of the same court in 1956 analogously held in the case of *Foltz v. Moore-McCormack Lines, Inc.*, 19 F. R. D. 301, that a motion must be granted because Congress gave the Rules the force and effect of a statute (cf. 28 U. S. C., sec. 2072). It necessarily follows that Judge Bicks could not give any consideration whatever to the affidavits of Arthur Kaiser because they are not pleadings under the Rules. See *Rank, et al. v. United States, supra*, and applicable rules; also, *Black v. Shondell, Coburn v. Coleman, Ginn v. Biddle, Acadian Production Corp. v. Land, Phillips v. Baker*, and *Van Sant v. American Express Co., supra.*

D. *Petitioner Should Not Be Subjected To Government By Men.*

Regardless of what District Judge Bicks thinks justice is, and in spite of what Circuit Judge Medina wants it to be, *justice is what the law says it is* and petitioner has a constitutional right to it even when his arguments are "technical". What the Court of Appeals has discarded as "technical arguments" are sound legal propositions which are fully supported by the Law of the Land.

The judgment sought to be reviewed could result in a coast-to-coast "shyster" — policy racket, if this Court should approve the illegal sanctioning of such "scrap of paper" treatment of life insurance contracts, destroying all confidence even in the legitimate life insurance companies. Does The Mutual Life Insurance Company of New York really believe that petitioner was paying premiums on his insurance contracts for such abuse? Incidentally, along the same line, such a preposterous belief would be no different from the unrealistic notion that your petitioner has been repeatedly making large disbursements for fees, printing, traveling and hotel expenses in connection herewith for summary denials of his rights, which denials do not even pretend to include a discussion of his points and a legal adjudication of them.

II. The Judgment Sought To Be Reviewed Has Deprived Petitioner Discriminatorily Of His Right to Due Process Of Law, Unlawfully Depriving Him Of His Right To Summary Judgment.

The Fifth Amendment to the Constitution of the United States guarantees petitioner that he shall not be

deprived of his property without due process of law. The judgment to be reviewed (App. 1) has deprived your petitioner of property rights including, but not limited to, the following: (A) the right to payment of the proceeds of the policies of insurance, with interest; (B) the right to litigate with due process of law to prevent the deprivation of said right; (C) the legal right to equal protection and application of the Federal Rules of Civil Procedure; and (D) the right to full consideration of the issues and legal points raised in his appeal, including the technical ones.

A. *Petitioner Has Been Deprived Of The Right To Full Use And Enjoyment Of The Proceeds.*

The wrongful acts of the respondent as above set forth have not only deprived petitioner of the proceeds of his policies of which he was the sole beneficiary, the absolute owner and the premium payer, but also of the income therefrom for over six years as well as the tremendous capital gains that would have accrued thereon.

B. *Petitioner Has Been Deprived Of His Right To A Day In Court.*

It is obvious that petitioner has not been allowed the right to be heard in advance of judgment, as contemplated by the Rules and applicable law, as well as by the Constitution. With due process of law, petitioner would have obtained summary judgment.

C. *Petitioner Was Denied Equal Protection Of The Federal Rules.*

It is well settled under the Rules that by its failure to plead or otherwise defend the action, the respondent

waived its right to do so, leaving the Court below no legal alternative but to enter summary judgment for plaintiff against defendant. Under the circumstances, the Court's refusal to apply Rule 56 was discriminatory.

When the matter came on to be heard in the District Court, all that was properly before Judge Bicks for consideration was plaintiff's undefended complaint and plaintiff's unopposed Note of Issue. It necessarily follows that there was no genuine issue as to any material fact, and Judge Bicks had no legal alternative but to grant plaintiff's Motion for Summary Judgment. *SMS Mfg. Co. v. U. S.-Mengel Plywoods, Inc.*, 219 F. 2d 606 (C. C. A. 10, 1955), held that if it affirmatively appears from the record that there is no genuine issue as to any material fact, the case is appropriate for disposition by summary judgment, and it becomes the duty of the Court to enter such judgment under Rule 56. Actually, there are so many authorities in support of the same point, the proposition should be considered elementary.

D. *Petitioner Was Denied Judicial Consideration And Review Of His Cause.*

The failure of the lower courts to have entered *legal* Opinions, manifesting consideration of all points and authorities submitted, subjects them to the exercise by petitioner of his right to criticize. That failure constituted violations of Canons of Judicial Ethics, there being a grave doubt about violations of Canon 1, Relations of the Judiciary; Canon 2, The Public Interest; Canon 3, Constitutional Obligations; Canon 5, Essential Conduct; Canon 6, Industry; Canon 14, Independence; Canon 19, Judicial Opinions; Canon 20, Influence of Decisions Upon

the Development of the Law; Canon 22, Review; and Canon, 34, Summary of Judicial Obligation.

The judges have a right to be wrong; but they have a concomitant duty to be sincere. Therefore, regardless of whether their conclusions are erroneous or legal, they must enter *legal* opinions as above set forth in order to keep their decisions above suspicion.

CONCLUSION

It is obvious from the foregoing that in the District Court your petitioner was subjected to a tyrannical Judge; and in the Court of Appeals he was discriminated against by a prejudiced Judge. Therefore, instead of this Honorable Court being the Court of last resort for your petitioner herein, it is actually the Court of only resort. Accordingly, in the exercise of its sound judicial discretion, this Honorable Court *a fortiori* should grant this petition for writ of certiorari.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 141—October Term, 1958.
(Argued January 15, 1959 Decided January 28, 1959.)
Docket No. 25312

PAUL GINSBURG, *Plaintiff-Appellant,*

—against—

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Defendant-Appellee.*

Before: MEDINA, LUMBARD and BURGER, *Circuit Judges*

Appeal from the United States District Court for the Southern District of New York, Alexander Bicks, *Judge.*

Paul Ginsburg appeals from an order of the District Court refusing to vacate a prior order denying his motion for summary judgment and declaring the action "enjoined" because an unvacated interpleader injunction of another Federal Court prohibited further procedural steps toward recovery. Opinion below not reported. Affirmed.

PAUL GINSBURG, *Pro se,* Pittsburgh, Pa.
CARL F. HOLLANDER, New York, N. Y. (Haughton Bell, New York, N. Y., on the brief), *for defendant-appellee.*

PER CURIAM:

Affirmed on the opinion of Judge Bicks, filed July 29, 1958.